

IN THE HIGH COURT OF DELHI AT NEW DELHI

CRL.L.P. No. 230 of 2013

STATE

..... Petitioner

Through: Ms. Charu Dalal for Mr. Saleem Ahmed,
ASC for State with IO/ASI Charan Dass from PS:
Mandir Marg.

versus

NAGENDER SHAH

..... Respondent

CORAM: JUSTICE S. MURALIDHAR

ORDER
17.01.2014

CRL.M.A.No.5530 of 2013 (for condonation of delay in filing the petition)

1. There is a delay of around 37 days in filing the present application for leave to appeal.
2. The Court finds that the explanation offered in this application is satisfactory. Accordingly, the delay in filing the leave petition is condoned.
3. The application is allowed.

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4. This is a petition under Section 378 (1) CrPC seeking leave to appeal against the judgment dated 18th December 2012 passed by the learned Additional Sessions Judge ('ASJ') acquitting the Respondent

of the offences under Sections 377/365/506 IPC in the case arising out of FIR No. 135 of 2011.

5. The case of the prosecution is that on 12th July 2011, information, recorded as DD No. 21A, was received by SI Daya Chand which was marked to SI Kedar Yadav. Both of them then proceeded to House No.64, servant quarter, Ashoka Road where a child (PW-2) and his mother (PW-10) met them. PW-10 informed them that PW-2 had been sodomised by a driver of an Innova car. PW-2 was examined and his statement (Ex.PW-2/A) was recorded in presence of his parents. The child purportedly stated that on 12th July 2011 at around 8 pm his mother had sent him to Gole Market for purchasing some chicken. On his return via RML Hospital at around 8.45 pm a white Innova car came from the RML side and the driver of the car enquired from the child about the way towards Gole Market. The child gave him the said information. The driver then asked the child to sit in the vehicle offering to drop him at his house. The child then sat in the vehicle, however, instead of dropping him at his house, the driver took the vehicle to a deserted *gali* near MS Flats at Birla Mandir, locked the vehicle from inside and committed sodomy on the child. When the child felt pain and raised an alarm, the accused closed the mouth of the child and threatened to kill him if he disclosed the matter to anyone. The driver is stated to have dropped the child and then left with his vehicle. The child disclosed the number of the Innova car to the police. He informed the police that when he reached his house he

disclosed the entire incident to his mother who then called police by dialling 100.

6. A notice was sent to the owner of the Innova car. It was revealed that on 12th July 2011 it was given to the Respondent who was its driver. The owner went along with the police and identified the Respondent as the driver. It is stated that upon interrogation, the Respondent confessed to his guilt. He is also said to have led the police to the place of incident and a 'pointing out' memo was prepared at his instance.

7. The Respondent declined to participate in the Test Identification Parade ('TIP') proceedings. He also declined to give a sample of his semen. The statement of the child under Section 164 CrPC was recorded before the learned Metropolitan Magistrate ('MM').

8. The Respondent was charged with the offences under Section 377/365/506 IPC on 4th January 2012. He pleaded not guilty and claimed trial. During trial which began first in the Court of the learned Additional Chief Metropolitan Magistrate ('ACMM'), on 15th February 2012, the child answered that he was born on 15th July 1998 and was studying in the 7th class. The learned ACMM satisfied himself that the child was not tutored and concluded that he was "a competent witness and can be examined in this case." The child's mother was permitted to remain present while he deposed. The child deposed that on 12th July 2011 at around 8 pm he went to Gole Market

to purchase vegetables and chicken as well as a ball pen. He disclosed that a white Innova car had come over when he reached Gate No.6 of R.M.L Hospital and the driver asked him the way to Gole Market which he pointed out. The child then pointed out to the accused and identified him to be the driver. He stated that the accused offered to drop him at his house and made him sit in the car. However, he stopped the vehicle in a lonely and deserted part of a lane behind Birla Mandir. The child stated that he could not get out as the door was locked by the accused. Thereafter the child stated: "I do not want to state further as I am feeling ashamed." At the request of the APP the further examination was deferred at that stage. The child also stated that a wrong thing was done to him and thereafter stated that he did not want to disclose anything. The further examination of the child was deferred as he remained mum despite repeatedly being asked to disclose as to what happened with him.

9. The child was present next before the learned MM to whom the case stood transferred on 4th April 2012. The Court proceeded to examine him in camera with the direction that the accused shall stand at the door so that he was not visible to the child but could hear him. Again the child declined to depose further "as he says he is feeling ashamed." The case was adjourned to 12th April. On 21st April 2012 an order was passed by the learned MM holding that prima facie an offence under Section 367 IPC also appeared to have been committed and the case at that stage was transferred to the Court of the learned

ASJ. On 7th May 2012, the charges under Sections 365/367/376/506 IPC against the accused were framed by the learned ASJ.

10. Before the learned ASJ there were two adjournments granted on 15th May and 23rd May 2012 to accommodate the convenience of the child. When the child was partly examined on 23rd May 2012 he informed the Court that he was 11 years old, was studying in the 7th class and that he was aware that he should be speaking the truth. He identified the Respondent as being the driver of the car. The precise answers given by the child on this date were as under:

“Accused Nagender Shah asked me that he will drop me at my home and asked me to sit down in his car. I refused to sit down in his car but accused Nagender Shah insisted to me to sit down in his car. I sat in his car and accused Nagender Shah took me towards Birla Mandir and he parked his car in a street. Thereafter, wrong thing was done with me (mere sath galat kaam hua).

At this stage, witness is repeatedly asked to say further but witness has stated that he does not want to disclose anything. He has been asked whether there is any pressure from the side of accused Nagender Shah. Witness is mum. From the facial expression, it appears to me that the witness is under some depression or embarrassment and he is unable to express further deposition.

Let the further examination-in-chief of the witness be deferred.”

11. The Court finds that the learned ASJ adopted the correct
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procedure in deferring the further examination-in-chief of the child. The next occasion for continuation of the examination-in-chief of the child was almost five months later and took place on 4th October 2012. The in camera proceedings of that date read as under:

“At this stage, witness has been asked repeatedly (number of times) about the incident but the witness has stated that he does not know anything more about the incident.

At this stage, this Court has again asked the witness about the incident if anything wrong was happened with him but the witness again stated that nothing was happened with him.

The police has not inquired from me about this case and the police did not meet me.

At this stage, Ld. Addl. PP for the State requested to cross-examine the witness as the witness has resiled from his previous statements.

I did not give any statement to the police.”

12. Thereafter the child appears to have completely resiled from all that he had stated to the police as well as regarding the statements made on the previous dates before the Court.

“Vol. On the last date of hearing, I had mentioned the vehicle No. DL 1YB-7085 as I was told by the police officials who met me outside the court but I do not know whose name. Vol. On the last date of hearing, I had stated that “mer saath galat kaam hua” the meaning of “galat kaam” was that I was not dropped by the driver as where I

was desired. It is wrong to suggest that “mere saath galat kaam hua” means that I was sodomised by the accused Nagender Shah. It is correct that I reached home around 10:00 PM. It is wrong to suggest that I told the incident to my mother and my mother made a call on 100 number or that I had told the description/identification of the accused to my mother or police or that I told the police I could identify the accused. Confronted with the statement Ex.PW2/A portion H to H where it has so been recorded. Vol. On the last date of hearing, I identify the accused on the direction of police uncle who met me outside the court. It is correct to say that some one came to my house and they asked me about this incident. It is wrong to suggest that on the night of 12/13.07.2011, police uncle came to me and recorded my statement Ex.PW2/A. Vol. Some uncle may be police officials came to me on that night and asked me about the incident and I told that uncle that I took a ride in a car and the car driver alighted me a far away distance from my house instead of near my house and I came to my house on foot at 10:00 PM”.

13. As regards the statement under Section 164 CrPC (Ex.PW-2/D) which was shown to the child in the Court, he stated as under:

“Vol. Whatever I had stated in my statement now Ex.PW2/D was given by me on the instructions of police uncle who met me outside the court and I myself gave the statement Ex.PW2/D without any pressure from any corner. It is wrong to suggest that I am deposing falsely to save the accused.”

14. At that stage the accused was shown to the child and he stated that “he is not the same person who has taken him away in his car or that

he had committed any unnatural sex with him”. The child went on to state:

“Vol. I was not sexually abused by anyone. It is wrong to suggest that I was sodomised by the accused Nagender Shah on 12.07.2011 and I had stated this fact in my complaint Ex.PW2/A as well as statement u/s 164 CrPC Ex.PW2/D”.

15. The trial Court appears to have asked the child as to why he was resiling from his earlier statement. The following answers in that regard are relevant:

“It is wrong to suggest that I am not identifying the vehicle deliberately or intentionally. It is wrong to suggest that I have made a compromise with the family of accused and as such I am not stating true facts of this case. It is wrong to suggest that the family members of the accused have pressurized me not to depose against the accused. It is wrong to suggest that accused has wrongfully confined me, threatened me to kill and also committed carnal intercourse with me. It is wrong to suggest that I had given the description of the accused and the vehicle involved in my complaint but today I am denying this fact intentionally or deliberately. It is wrong to suggest that I had identified the accused during investigation in Patiala House Court premises and today I am not identifying the accused”.

16. The Court is, therefore, satisfied that the learned trial Court made every effort to ascertain whether there was any pressure on the child which was making him resile from his previous statement.

17. The mother PW-10 also did not support the prosecution during

the trial. She stated that the child returned on the date of the alleged incident at around 10/11 pm and when she questioned him as to why he returned so late, she stated that “then my son told me that one person had committed *cherkhani* with him and he did not disclosed further details to me. Noticing this fact of *cherkhani* I informed the police on 100 number from my mobile phone bearing no. 9958607140. I conveyed this information to police that somebody had done *cherkhani* with my son. Police reached at my home and took my son to RML Hospital in emergency. I had accompanied with my son along with the police to the hospital. My son was subjected to medical examination by the doctor, however I remained outside the room. Thereafter, my son was taken to the police station. My son had narrated the entire incident to the police. Thereafter, I brought my son to the home. Thereafter, I had produced my son ** before the court but I do not recollect such dates. Police had recorded my statement, wherein I had told the incident of *cherkhani* with my son which was told to me by my son. My son was taken by the police to know and identify the place the incident where the *cherkhani* had been committed with him, however, I had not accompanied with the police. I cannot explain the term a word *cherkhani*.”

18. At that stage the learned APP sought permission to declare the witness to be hostile and with the Court’s permission cross-examined her. She proceeded to resile from the case earlier made out by her to the police. She specifically denied that her son had conveyed to her that the driver of the Innova car made him sit in the car, took him to a

deserted place near Birla Mandir and closed the window glass of the car and threatened to kill him and inserted his penis in his mouth and anus and committed a wrong act with him. She denied that “under the pressure and influence of accused family, I am showing pity upon the accused and suppressing the true facts”. She further denied the suggestion that “I know the entire incident very well and deliberately confining the facts in the form of only to the *cherkhani*.”

19. The question that arose for determination by the learned trial Court was, therefore, whether in light of the two key witnesses i.e. the child (PW-2) and mother (PW-10) not supporting the case of the prosecution, the case against the accused could be stated to have been proved beyond all reasonable doubt. The trial Court came to the conclusion that the prosecution had failed to prove the offences with which the accused was charged and accordingly proceeded to acquit him.

20. Ms. Charu Dalal, learned counsel for the Petitioner, placed considerable reliance on the decisions of the Supreme Court in ***Bhajju v. State of Madhya Pradesh (2012) 4 SCC 327*** and ***Attar Singh v. State of Maharashtra JT 2012 (12) SC 450*** to urge that the learned trial Court erred in rejecting in toto the evidence of the prosecution only because PW-2 and PW-10 turned hostile. She submitted that even where the prosecution witnesses turn hostile it would be open to the Court to rely upon such evidence “to the extent to which it supports the prosecution version of the incident”. She submitted that

the evidence of the hostile witness can form the basis of conviction “if corroborated by other reliable evidence”.

21. Ms. Dalal submitted that there was sufficient evidence on record to substantiate that it was the Respondent who drove the Innova car on the date of the incident, that he was the one who offered to drop the child to his home, it was he who took the child in his car and later dropped him off at home. She further submitted that the fact that the accused declined to submit his semen sample for forensic testing and declined to participate in the TIP should lead to an adverse inference against him. She submitted that the other evidence corroborated that portion of the evidence of the hostile witnesses which supported the case of the prosecution.

22. The facts in *Bhajju* were that the accused were charged with causing death by burning of his wife suspecting her to be having illicit relations. Her dying declaration was recorded by a competent officer, and duly attested by a doctor. The Court noted that none of the witnesses or the authorities involved in the recording of the dying declaration had turned hostile. On the contrary, they fully supported the case of the prosecution and proved beyond reasonable doubt that the dying declaration was reliable, truthful and was voluntarily made by the deceased. The two witnesses who turned hostile were the persons who met the deceased first after she was put on fire. While initially they told the police that the deceased had told them that accused had poured kerosene on her and set her on fire, they later

resiled stating that she had caught fire and her burn injuries were accidental. This was, therefore, not a case where apart from the two hostile witnesses there was no evidence to show that the deceased was set on fire by the Appellant in that case. The dying declaration itself was a solemn piece of evidence which was proved in accordance with law by the officials who recorded the dying declaration. Therefore, in the context of the charge against accused in that case that of causing death by burning there was clear evidence *de hors* the evidence of the two hostile witnesses.

23. In the present case, the charge against the accused is of committing sodomy under Section 377 IPC and in the context of that charge the only substantive evidence is in the form of the depositions of PW-2 and his mother PW-10. Both these witnesses were the persons who spoke of alleged commission of the offence in the first instance but in the Court neither of them supported the case of the prosecution. There is absolutely no other corroborative evidence as regards the primary charge against the accused of having committed sodomy. The corroborative evidence that was there is only to the extent that he was the driver of the car and he offered to drop the child at his home in the car. In any event, on this aspect there appears to be no conflict at all. The observation in ***Bhajju*** in para 36 to the extent that there is no legal bar “to base the conviction of the accused upon the testimony of a hostile witness if corroborated by other reliable evidence”, obviously speaks of the corroboration for the offences with which the accused is charged. In the present case, as noticed earlier,

there is no corroboration by the other witnesses of the commission of the offence with which the Respondent is charged i.e. the offence under Sections 377/367/365 IPC.

24. Ms. Dalal urged that given the nature of the offence, it is unlikely that the other witnesses would be subject to corroboration with what happened with the child when he was in the vehicle. She further submitted that it is possible that witnesses were under pressure from the accused to resile from their statements.

25. The above apprehension expressed by learned counsel for the Petitioner appears to have been fully accounted for by the learned ASJ as is reflected from the detailed questioning that he subjected both witnesses to when they resiled from their earlier statements. He did satisfy himself that they were not under pressure to change their version. There is a larger issue regarding the witness protection for which there does not appear to be any effective scheme put in place by the State. In the absence of anything concrete brought on record by the prosecution to show that the witnesses were subjected to any intimidation or threat by the accused, it is unsafe to surmise that the witnesses must have been won over by the accused. In a criminal trial that has grave consequences for the accused, it is not permissible for the Court to proceed on the basis of guess work and convict an accused on that basis notwithstanding that the principal witnesses against the accused have turned hostile.

26. The mere fact that the accused declined to give his semen sample or to participate in the TIP proceedings cannot by themselves lead to an adverse inference against the accused.

27. In the present case, as already noticed, given the nature of the offence, the evidence of the child and his mother were critical to prove the charge against the accused. When both of them failed to support the case of the prosecution, there was no other substantive piece of evidence on record to proceed to hold the Respondent guilty.

28. In the considered view of the Court, the learned trial Court rightly declined to hold the Respondent guilty on the facts and circumstances of the case.

29. Accordingly, leave to appeal is declined. The petition is dismissed.

30. The trial Court record be sent back forthwith.

S. MURALIDHAR, J

JANUARY 17, 2014

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